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8 Attorneys for Defendants  
9 Lykes Lines Ltd., LLC and  
10 Marine Personnel and Provisioning, Inc.

11 **UNITED STATES DISTRICT COURT**  
12 **NORTHERN DISTRICT OF CALIFORNIA**

13 DAVID PERRY,

14 Plaintiff,

15 vs.

16 LYKES LINES, LTD., LLC and MARINE  
17 TRANSPORT CORPORATION,

18 Defendants.

19 Case No. C 04 2560 EMC ARB

20 ANSWER OF DEFENDANTS LYKES  
21 LINES, LTD., LLC, AND MARINE  
22 PERSONNEL AND PROVISIONING,  
23 INC. TO SEAMAN'S COMPLAINT FOR  
24 PERSONAL INJURIES AND  
25 DAMAGES UNDER THE JONES ACT  
26 AND GENERAL MARITIME LAW

27 LYKES LINES, LTD., LLC, and MARINE PERSONNEL AND PROVISIONING, INC.,  
28 a division of MARINE TRANSPORT CORPORATION (erroneously named herein as Marine  
Transport Corporation), hereafter "Defendants," answers plaintiff's complaint for personal  
injuries and damages under the Jones Act and general maritime law.

1. Defendants admit the allegations of paragraph 1.

2. Defendants deny the allegations of paragraph 2, basing the denial on lack of  
information or knowledge sufficient to admit or deny the allegations thereof.

3. Defendants deny the allegations of paragraph 3, except admit and allege that at all  
times material herein, the LYKES MOTIVATOR was owned by LYKES LINES LTD., LLC.

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4. Defendants deny the allegations of paragraph 4, except admit and allege that at all times material herein the plaintiff David Perry was a member of the crew of the LYKES MOTIVATOR, and that at all times material herein the plaintiff David Perry was employed by MARINE PERSONNEL AND PROVISIONING, INC.

5. Defendants deny the allegation of paragraph 5.

6. Defendants deny the allegations of paragraph 6, except admit and allege MARINE TRANSPORT CORPORATION is doing business in the Northern District of California.

7. To the extent that plaintiff incorporates paragraphs 1 through 6 into this claim for relief, Defendants incorporate their responses to those paragraphs here.

8. Defendants deny the allegations of paragraph 8, except admit and allege that at all times material herein Garrick Slack was a member of the crew of the LYKES MOTIVATOR and he was involved in an altercation with Plaintiff on said vessel.

9. Defendants deny the allegations of paragraph 9.

10. Defendants deny the allegations of paragraph 10.

11 Defendants deny the allegations of paragraph 11

12 Defendants deny the allegations of paragraph 12

13 Defendants deny the allegations of paragraph 13

14. To the extent that plaintiff incorporates paragraphs 1 through 13 into this claim for relief, Defendants incorporate their responses to those paragraphs here.

15. Defendants deny the allegations of paragraph 15.

## AFFIRMATIVE DEFENSES

As and for separate, distinct, and affirmative defenses to the complaint and to each and every cause of action thereof, Defendants, and each of them, allege:

## **FIRST AFFIRMATIVE DEFENSE**

AS AND FOR A FIRST, SEPARATE AND AFFIRMATIVE DEFENSE to the complaint and each of its purported causes of action, United States alleges that plaintiff's

1 complaint and each cause of action and prayer for relief therein fail to state a cause of action  
 2 against these answering Defendants upon which relief may be granted.

3 **SECOND AFFIRMATIVE DEFENSE**

4 AS AND FOR A SECOND, SEPARATE AND AFFIRMATIVE DEFENSE to the  
 5 complaint and each of its purported causes of action, Defendants allege that plaintiff, his agents  
 6 and doctors failed to exercise reasonable care in order to avoid loss and minimize resulting  
 7 damage, such damages being expressly denied by these answering Defendants. The injuries  
 8 and/or damages, if any, referred to in plaintiff's complaint were proximately caused or  
 9 contributed to by plaintiff's own failure to exercise such care and mitigate damages.

10 **THIRD AFFIRMATIVE DEFENSE**

11 AS AND FOR A THIRD, SEPARATE AND AFFIRMATIVE DEFENSE to the  
 12 complaint and each of its purported causes of action, Defendants allege that they are entitled to  
 13 restitution, an offset, or both from plaintiff for amounts paid to plaintiff by these answering  
 14 Defendants for maintenance and cure, unearned wages and other sums for which these answering  
 15 Defendants were not liable, erroneously tendered or for which plaintiff was compensated by a  
 16 third party, including but not limited to payments received by plaintiff under his union health &  
 17 welfare plan and wages paid by other employers.

18 **FOURTH AFFIRMATIVE DEFENSE**

19 AS AND FOR A FIRST, SEPARATE AND AFFIRMATIVE DEFENSE to the  
 20 complaint and each of its purported causes of action, Defendants allege that the injuries and/or  
 21 damages, if any, referred to in plaintiff's complaint were proximately caused, in whole or in part,  
 22 and contributed by the negligence on the part of plaintiff and that plaintiff failed to exercise  
 23 ordinary care on plaintiff's own behalf prior to and at the time and place the incident referred to  
 24 in the complaint on file herein.

25 **FIFTH AFFIRMATIVE DEFENSE**

26 AS AND FOR A FIRST, SEPARATE AND AFFIRMATIVE DEFENSE to the  
 27 complaint and each of its purported causes of action, Defendants allege that plaintiff's injuries  
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1 and/or damages, if any were caused entirely, or in part, by the negligence or fault of third  
 2 persons or entities, including plaintiff's treating physicians and/or employers, and consequently  
 3 this answering defendant is not liable therefore. The proportionate degree of negligence or fault  
 4 of each person or entity, whether parties to the action or not, should be determined and pro-rated  
 5 or otherwise apportioned, and any judgment that might be entered against these answering  
 6 Defendants should be reduced by that degree of fault to exist as to said other persons or entities.

7 **SIXTH AFFIRMATIVE DEFENSE**

8 AS AND FOR A SIXTH, SEPARATE AND AFFIRMATIVE DEFENSE to the complaint  
 9 and each of its purported causes of action, Defendants allege that plaintiff's injuries and/or  
 10 damages, if any, were caused entirely or in part by his own willful misconduct or intentional  
 11 conduct, and this answering defendant is not liable in damages or maintenance and cure or both as  
 12 a result of such conduct or misconduct.

13 WHEREFORE, Defendants pray for judgment in their favor, that plaintiff take nothing  
 14 by his own complaint, and that the same be dismissed, that defendants be awarded costs of suit  
 15 herein incurred, and for such other and further relief as the Court may deem proper.

16 DATED: July 29, 2004

17 EMARD, DANOFF, PORT & TAMULSKI, LLP

18 By: \_\_\_\_\_ /S/

19 Wayne F. Emard  
 20 Katharine Essick  
 21 Attorneys for Defendant  
 22 LYKES LINES, LTD., LLC and MARINE  
 23 PERSONNEL AND PROVISIONING, INC.